

TRAINING THE STRATEGIC CORPORAL:  
PRESENTING ALTERNATIVES IN  
LAW OF WAR TRAINING

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Strategy

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The opinions and conclusions expressed herein are those of the student author and do not necessarily represent the views of the U.S. Army Command and General Staff College or any other governmental agency. (References to this study should include the foregoing statement.)

## ABSTRACT

TRAINING THE STRATEGIC CORPORAL: PRESENTING ALTERNATIVES IN LAW OF WAR TRAINING, by MAJ Edward P. (Ned) Ash, 72 pages.

Current training of Soldiers on handling detainees is very proscriptive in terms of what actions may or may not be taken. Far less time is spent on how to deal with unlawful orders, although Soldiers are told to refuse to follow one should they receive it.

Interpretations of the laws of war are not universally accepted--this thesis contrasts the viewpoints of three human rights organizations with the DoD's to see if the Army training is sufficient. An analysis indicates that it is, but that key sections of the international law are underdeveloped and require refined definitions. Additionally, the type and amount of annual training Soldiers receive in compliance with United States treaty obligations should be expanded while Soldiers are deployed in the current operating environment.

## ACKNOWLEDGMENTS

In 2006 my fiancée, Jamie Skaluba, took me to a screening of *The Road to Guantanamo* sponsored by Amnesty International. In a conversation after the event with Jumana Musa, the Amnesty International USA Advocacy Director for Human Rights and International Justice, I asked her what programs Amnesty was running to educate Soldiers and prevent detainee abuse. In the silence that followed I decided that I wanted to learn more about this myself, and this thesis is the result.

I wish to thank my thesis committee members from the Command and General Staff College--Chaplain (Major) Terry E. Jarvis, BG William D. R. Waff, and especially Lieutenant Colonel (Ret.) Tim McKane, who all provided me with the guidance and encouragement to see this through to completion.

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## ACRONYMS

AI	Amnesty International
AR	Army Regulation
CAT	(The 1984) Convention Against Torture
CI	Civilian Internee
CID	Cruel, Inhuman, and Degrading (Treatment)
CSRB	Combatant Status Review Board
DoD	Department of Defense
DoDD	Department of Defense Directive
EPW	Enemy Prisoner of War
FM	Field Manual
GEN	General
HRW	Human Rights Watch
HUMINT	Human Intelligence
ICRC	International Committee of the Red Cross
MCA	The Military Commissions Act of 2006
NCO	Noncommissioned Officer
RP	Retained Person
UCMJ	Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UN	United Nations
WO	Warrant Officer



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## CHAPTER 1

### INTRODUCTION

In many cases, the individual Marine will be the most conspicuous symbol of American foreign policy and will potentially influence not only the immediate tactical situation, but the operational and strategic levels as well. His actions, therefore, will directly impact the outcome of the larger operation; and he will become, as the title of this article suggests--the *Strategic Corporal*.<sup>1</sup>

GEN Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*

So long as the United States remains the dominant military power, it is likely to face a future of asymmetric conflicts with insurgent groups. In these protracted campaigns, the focus of the insurgents is ultimately on swaying the opinions of both the local and the American populations. Even if the United States military does not become involved, the opinions of the American people are likely to be targeted by the insurgents in order to provide material support or prevent intervention. When the United States military is deployed against an insurgency, as it has been in Afghanistan and Iraq, the insurgents' best chance of causing the military to leave the field is to target the opinions of the American people.

With the rise of satellite communication, the Internet, and the 24-hour news cycle, events that unfold on the other side of the globe are transmitted for America's consumption at near-instantaneous speed. This has created the Strategic Corporal, a reality in which,

The actions of Soldiers and leaders and their efforts on the ground can resonate at a strategic level in an instant. Shaping the message and tying that message to operations is as important, if not more so, to the desired individual effect as [all other operations in theater].<sup>2</sup>

Arguably the least "shape-able" actions to emerge from recent conflicts have been the atrocities committed by United States troops. At Abu Ghraib and Samarra, Soldiers violated the law of war in the conduct of interrogations and in the treatment of detainees--creating a whirlwind of controversy in the international media, doubts about the war on terror in America, and ill will in the Middle East.

A recent *Army Times* article reported the results of a survey commissioned by the Army Chief of Staff, Gen. George Casey. Soldiers and Marines in Iraq and Afghanistan were anonymously polled on their opinions about torture and the treatment of noncombatants.<sup>3</sup> When asked if "Torture should be allowed in order to gather important info about insurgents," 36 percent responded with "agree" or "strongly agree."<sup>4</sup> Only 55 percent had the same response to "I would report a unit member for injuring or killing a noncombatant."<sup>5</sup> This raises serious questions about how Soldiers and Marines are trained in the law of war.

Current training of Soldiers on handling detainees is very proscriptive in terms of what actions may or may not be taken (e.g., detainees may be made to wear opaque goggles, but may not have sandbags placed over their heads). Far less guidance is given on how to recognize an unlawful order, although Soldiers are told to refuse to follow one should they receive it. This creates a situation in which the sole interpreter of the law of war is the Department of Defense (DoD), whose decisions and authority are delegated through the chain of command to the trainer and expressed to the trainee. These interpretations of the laws of war are not universally accepted. If a Soldier receives a dubious order, the same authority that a soldier should be questioning holds the power to define the legality of its orders. An Army full of educated, thoughtful Soldiers would

seem to be the most effective weapon in the current operating environment, but their current training falls short of enabling them to make these difficult decisions.

### Proposed Research Questions

This paper will examine the training provided for Soldiers enlisted in the Army. The primary research question will answer: Is the Department of the Army law of war training for detainee handling and interrogation is sufficient to prepare Soldiers for contemporary operations? This poses several subordinate questions. The first question is if those interpretations should be presented. The second is if there are significant differences between the interpretations of the Department of the Army and Human Rights Organizations. The third is if interpretations of human rights organizations could be presented by a soldier to other soldiers. The fourth is what the current Army standard is for training. And the fifth is what the restrictions are on this type of activity by soldiers.

### Thesis

Department of the Army law of war training for detainee handling and interrogation is not sufficient to prepare Soldiers for contemporary operations.

### Assumptions

The presentation of materials that contradict or criticize the policies of the DoD is permissible so long as the position of the Department is presented on equal footing. This would ultimately depend on a determination by the command that there is not a "clear danger to the loyalty, discipline, or morale of military personnel"<sup>6</sup> in accordance with DoD Directive 1325.6. This presents the possibility for multiple, simultaneous requests

for review through multiple command levels. This research will seek to discover which office to submit any new training materials to should they be required.

### Scope and Delimitations

The area of detainee operations and interrogation that this paper will focus on is from the point of capture to the detention facility. These operations are usually executed by enlisted Soldiers in the ranks of Private through Private First Class under the supervision of a junior Noncommissioned or Commissioned Officer. The specialty of these Soldiers is rarely detention operations.

This paper will address the "could" and "should" of using multiple interpretations of the law of war in detainee handling and interrogation training. It will not seek an answer to "would."

Other services are involved in the War on Terror, but this research will refer to everyone as a "Soldier" in the "Army" since detainee operations is assigned to the Army under *United States Code Title 10*.

This research will focus on three organizations to represent the international human rights community for the following reasons. Amnesty International has the largest membership of the three, has a body of experts on the area of this paper, and investigates claims of human rights abuses. Human Rights Watch is smaller, but it still has many subject-matter experts, and it devotes a greater percentage of its resources to investigation and research than it does to activism. Finally, the ICRC has the longest history of prisoner visitation. It has developed an inspection checklist and standards for holding people that will be relevant to this paper.

This thesis will be drawn from unclassified sources. If materials are unavailable for general release, the research will instead summarize it in a manner that will not reveal specific techniques or procedures.

### Significance of Study

Better training for Soldiers will create more of the ideal "strategic corporals" that represent the United States in all theaters. By providing Soldiers with the tools to decide which actions go past the boundaries of international law, the Army can reduce the recurrence of public relations debacles like Abu Ghraib and Samarra.

### Methodology

This thesis consists of five chapters including the introduction. Chapter 2 will review the literature applicable to this area. Chapter 3 will describe the research methodology used in the rest of the thesis.

Chapter 4 will compare the literature. This analysis will focus on the different interpretations of the subject area by Amnesty International (AI), Human Rights Watch (HRW), and the International Committee of the Red Cross (ICRC) vs. that of the DoD.

Chapter 5 will list the thesis conclusions and recommendations. Depending on the results of the previous chapters, educational materials may be included as appendixes to the body of the paper.

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<sup>1</sup>GEN Charles C. Krulak, "The Strategic Corporal: Leadership in the Three Block War," *Marines Magazine* (January 1999); available from [http://www.au.af.mil/au/awc/awcgate/usmc/strategic\\_corporal.htm](http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm); Internet; accessed 15 April 2007.

<sup>2</sup>Peter Chiarelli and Patrick Michaelis, "Winning the Peace, The Requirements for Full-Spectrum Operations," *Military Review* (July-August 2005): 14-15 [document on-

line]; available from [http://findarticles.com/p/articles/mi\\_m0PBZ/is\\_4\\_85/ai\\_n15674580](http://findarticles.com/p/articles/mi_m0PBZ/is_4_85/ai_n15674580); Internet; accessed 11 June 2007.

<sup>3</sup>Kimberly Johnson and Kelly Kennedy, "Almost Half of Surveyed Troops Say Some Torture OK," *Army Times*, 14 May 2007, 28.

<sup>4</sup>Ibid.

<sup>5</sup>Ibid.

<sup>6</sup>U.S. Department of Defense, Department of Defense Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, by John P. White (Washington, D.C., 2003), 2 [document on-line]; available from [http://www.dtic.mil/whs/directives/corres/pdf/d13256\\_100196/d13256p.pdf](http://www.dtic.mil/whs/directives/corres/pdf/d13256_100196/d13256p.pdf); Internet; accessed 29 October 2006.

## CHAPTER 2

### LITERATURE REVIEW

The purpose of this study is to determine if military leaders should include the interpretations of the law of war by human rights organizations in their detainee handling and interrogation training. Chapter 2 will analyze the literature required to answer the subordinate questions.

This chapter is organized into five sections. The first section will review the applicable conventions, treaties, and declarations that cover detainee handling and interrogations. The second section will detail what the current DoD directives and instructions are in this area. The third section will provide a brief survey of field manuals and Army regulations. The fourth section will introduce the three human rights organizations used in this paper and their positions on these issues. Finally, the fifth section will cover the DoD directives and instructions that deal with restrictions on speech, press, and assembly that could restrict the presentation of these ideas by Soldiers to Soldiers.

#### Applicable Conventions, Treaties, and Declarations

The Hague Conventions were among the first steps in formalizing into international law what had, up to that point, only been customary law. There were two Hague Conventions. The first was adopted on 29 July 1899 and entered into force on 4 September 1900. The second, adopted on 18 October 1907 and entered into force on 26 January 1910 expanded the first Hague Convention. However, the articles on treatment of belligerents were identical in both documents. The Hague Conventions defined a



belligerent as a member of an army, militia, or volunteer corps that met these qualifications: "To be commanded by a person responsible for his subordinates; To have a fixed distinctive emblem recognizable at a distance; To carry arms openly; and To conduct their operations in accordance with the laws and customs of war."<sup>1</sup> It also said that non-combatants that were captured must also be treated as prisoners of war by the enemy.

The Hague Conventions made clear how the state was to deal with prisoners of war. Article four says that, "Prisoners of war . . . must be humanely treated," and article seven states, "The Government into whose hands prisoners of war have fallen is charged with their maintenance."<sup>2</sup> Although the Hague Conventions did not explicitly address torture, the intent of its drafters is clear. It goes on to state that prisoners should be treated in the same manner that the capturing state treats its own Soldiers, including in matters of discipline.

The Geneva Conventions were the other initial attempt at formalizing international law. The Second *Convention Relative to the Treatment of Prisoners of War* was drafted after World War Two to update the 27 July 1929 convention. It was adopted 12 August 1949 and entered into force on 21 October 1950.<sup>3</sup> It was ratified by the United States Senate on 2 August 1955.<sup>4</sup> The Second Convention supplemented the original Hague Conventions. However, the Geneva Conventions was different in that it applied to all its signatories even if their enemy was not a signatory.<sup>5</sup>

The protections in the Geneva Conventions applied to all those who met the criteria required to be a prisoner of war. The four requirements in Article 4 of the Second Geneva Convention are nearly identical to the Hague Conventions: a commander, fixed

distinctive sign, openly carrying arms, and conducting operations in accordance with the laws of war.<sup>6</sup> However, the categories of persons to whom the definition could apply was expanded to the following: members of armed forces, militia, volunteer corps, and resistance movements; "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power;" persons accompanying the armed forces (e.g., reporters, civilian contractors, etc.); merchant marine; and "Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."<sup>7</sup>

The *Second Geneva Convention Relative to the Treatment of Prisoners of War* went into much greater detail than the preceding Hague Conventions. In the general provisions, part one, article three states that: "the following acts are and shall remain prohibited at any time and in any place whatsoever. . . . Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . [and] outrages upon personal dignity, in particular, humiliating and degrading treatment."<sup>8</sup>

Part Three of the conventions dealt with captivity. The Geneva conventions specifically dealt with torture in Article 17.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.<sup>9</sup>

It further elaborated on detainee treatment in section VI (relations between POWs and the authorities), chapter III (penal and disciplinary sanctions), article 87: "corporal

punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty, are forbidden."

The United States signed the *Charter of the United Nations* on 26 June 1945, and this was ratified by the Senate on 28 July 1945.<sup>10</sup> Article 55 of the Charter stated that one of the missions of the organization was to: "Promote universal respect for and observance of, human rights and fundamental freedoms."<sup>11</sup> One of the initial acts of the United Nations was the adoption of the *Universal Declaration of Human Rights* (UDHR), in 1948. Declarations do not require Senate ratification. This, along with reluctance in the Senate to ratify human rights treaties until the 1980s, has resulted in it never being ratified and given the force of U.S. law. Nevertheless, it has been incorporated into the constitutions of over 100 member-nation of the UN, and is considered to have the force of international customary law.<sup>12</sup> Article 5 of the UDHR states that, "no one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment."<sup>13</sup> Later conventions would provide more specific definitions for these terms.

*The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted by the General Assembly on 9 December 1975.<sup>14</sup> It also was not ratified by the Senate since it is a declaration, but its language informs the 1984 conventions discussed below. Article One defines torture as,

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person a confession . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official. . . . It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>15</sup>

This is the first specific definition of torture in international law.

Article Three eliminates possible defenses of torture with, "Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment."<sup>16</sup> Article Five establishes who must be trained in each state to prevent abuse:

The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.<sup>17</sup>

These definitions of torture, limitations on defenses against its use, and requirements for training would be used by all further international laws.

The *International Covenant on Civil and Political Rights* was signed by the United States on 5 October 1977, entered into force on 29 March 1979, and was ratified by the Senate on 8 June 1992.<sup>18</sup> It was the first piece of formal international law signed and ratified by the U.S. after the 1975 declaration which used the same formulation. Article Seven states, "No one shall be subjected to torture or cruel, inhuman, or degrading treatment or punishment."<sup>19</sup> Article seven does not define any of the terms in the same level of detail as the previous declaration.

The *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted on 10 December 1984.<sup>20</sup> It entered into force on 26 June 1987, was signed by the United States on 18 April 1998, and ratified by the Senate on 21 October 1994.<sup>21</sup> During ratification, the Senate passed these reservations: "nothing in this Convention requires or authorizes legislation, or other action, by the

United States of America prohibited by the Constitution of the United States as interpreted by the United States."<sup>22</sup> Article One of this convention defined torture identically to the 1975 declaration. Article Two eliminates the same extenuating circumstances as the 1975 declaration. This convention goes further than the 1975 declaration, though, in prohibiting the transfer of prisoners to a country where there are substantial grounds to believe they would be in danger of torture.<sup>23</sup>

Article Ten expands on the language of the 1975 declaration by specifically including military personnel in the groups that must be educated by signatories to the convention. It requires that, "education and information are fully included in the training of . . . military . . . and other persons who may be involved in the custody, interrogation, or treatment of any individual subjected to any form of arrest, detention or imprisonment."<sup>24</sup> Articles 11--13 require the establishment of, "systems to review methods and practices, investigate alleged abuses, and provide hearings with competent authorities" for individuals who claim they have been subjected to torture.<sup>25</sup> Article Sixteen requires that states "prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture" and enact the same provisions in Articles Ten through Fourteen to protect persons who claim they have been subjected to this kind of abuse.<sup>26</sup>

The final piece of international law relating to detainees and interrogation was the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. It was adopted on 18 December 2002 and entered into force on 22 June 2006.<sup>27</sup> It establishes a Subcommittee on Prevention of Torture and Other Cruel, Inhuman, or Degrading Treatment to "establish a system of regular visits

undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."<sup>28</sup> It has yet to be signed or ratified by the United States.<sup>29</sup>

### United States Law

The directives in the following section were revised as a result of "The Detainee Treatment Act of 2005," a part of the "National Defense Authorization Act for Fiscal Year 2006," passed on 6 January 2006.<sup>30</sup> It forbids interrogation techniques "not authorized by, and listed in, the U.S. Army Field Manual on Intelligence Interrogation." There is no "Army Field Manual on Intelligence Interrogation;" however, there is a Field Manual

2-22.3 *Human Intelligence Collector Operations*. It will be discussed later in the literature review.

The "Detainee Treatment Act of 2005" also forbids subjecting detainees to "cruel, inhuman, or degrading treatment" and requires that the Secretary of Defense report on the procedures for the status review of detainees currently being held.<sup>31</sup> The Act defines cruel, inhuman, and degrading treatment as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States."<sup>32</sup> The Fifth Amendment enumerates a citizen's rights in a criminal trial (grand jury for a capital crime, self incrimination, double jeopardy, etc). The Eighth Amendment prohibits excessive bail as well as cruel and unusual punishment. Finally, the Fourteenth Amendment guarantees due process and equal protection under the law.<sup>33</sup>

"The Military Commissions Act of 2006" was passed in response to the Supreme Court Decision of *Hamdan v. Rumsfeld*.<sup>34</sup> The content of both documents is largely beyond the scope of this paper, since they deal with the rights of persons tried at military holding facilities above the Brigade level. It is included for the sake of completeness and because the act contains the following text: "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."<sup>35</sup>

#### DoD Directives and Instructions on Detainee Handling and Interrogations

Directives and Instructions are the methods by which the Department of Defense dictates policy to the Armed Forces. They generally contain the subsections of applicability, policy, and responsibilities. They are usually signed by the Secretary of Defense or by the relevant Undersecretary.

The Department of Defense updated Department of Defense Directive 2311.01E, *DoD Law of War Program*, on 9 May 2006. It defines the law of war as "international law that regulated the conduct of armed hostilities," and that it includes "treaties and international agreements to which the United States is a party, and applicable customary international law."<sup>36</sup> It requires "members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."<sup>37</sup> Also, it requires that "an effective program to prevent violations of the law of war is implemented by the DoD Components."<sup>38</sup> It tasks the "Secretaries of Military Departments to provide . . . training so the principles and rules of the law of war will be known to members of their respective Departments. Such knowledge will be commensurate with each individual's duties and responsibilities."<sup>39</sup>

Department of Defense Directive 2310.01E, *DoD Detainee Program*, is dated 5 September 2006 and applies to "all organizational entities in the DoD" and to people not in the department "as a condition of permitting access to internment facilities or to detainees under DoD control."<sup>40</sup>

It distinguishes between lawful and unlawful combatants. Lawful combatants include,

members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war, and members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.<sup>41</sup>

Unlawful enemy combatant are

persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States.<sup>42</sup>

In the process of distinguishing between lawful and unlawful combatants, this directive highlights that lawful combatants are entitled to protections under Common Article Three of the Geneva Conventions. It goes on to state that all detainees, both lawful and unlawful, "shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy."<sup>43</sup>

The DoD Detainee Program establishes a detainee treatment policy that includes unlawful combatants:

All persons . . . detained . . . will be given humane care and treatment . . . until release, including: Adequate food, drinking water, shelter, clothing, and medical treatment; free exercise of religion . . . all detainees will be respected as human beings. They will be protected against threats or acts of violence including rape,



forced prostitution, assault and theft, public curiosity, bodily injury, and reprisals. They will not be subjected to medical or scientific experiments. They will not be subjected to sensory deprivation. This list is not exclusive . . . The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocation.<sup>44</sup>

It requires that all persons subject to the directive "receive instruction and complete training, commensurate with their duties, in the laws, regulations, policies, and other issuances applicable to detainee operations [and] prevention of violations of the same."<sup>45</sup>

It tasks the Secretary of the Army to "establish detainee operations training and certification standards," and develop programs for periodic review.<sup>46</sup>

Department of Defense Directive 3115.09, *DoD Intelligence Interrogations, Detainee Debriefings and Tactical Questioning*, issued 3 November 2005, updated Executive Order 12333, "United States Intelligence Activities" dated 4 November 1981. It applies to the same people as the DoD Detainee Program (i.e., everyone in DoD and anyone else as a condition of access to detainees controlled by the DoD).<sup>47</sup> It states that "All captured or detained personnel shall be treated humanely, and all intelligence interrogations, debriefings, or tactical questioning to gain intelligence from captured or detained personnel shall be conducted humanely, in accordance with applicable law and policy"<sup>48</sup> (e.g. "The Detainee Treatment Act of 2005"). It also designates that:

DoD personnel responsible for detention operations . . . are responsible for ensuring the safety and well being of detainees in their custody. They shall not directly participate in the conduct of interrogations.<sup>49</sup>

However, DoD personnel may "facilitate interrogation operations" IAW relevant laws and directives. Specifically, military working dogs "shall not be used as part of on interrogation approach nor to harass, intimidate, threaten, or coerce a detainee for interrogation purposes."<sup>50</sup>

## Field Manuals and Army Regulations

Army Field Manuals codify doctrine and provide a guide for accomplishing tasks. They are the basis from which Army subject matter experts (lawyers in the Judge Advocate General Corps) and trainers draw the lesson plans used to train soldiers. The lesson plans are typically classified "For Official Use Only," and would therefore not be usable in this paper. However, the field manuals from which they are derived are not classified, and will therefore be used to determine how soldiers are trained. This section will analyze two of them that speak to detainee operations and interrogation.

Field Manual Interim 3-90.5, *The Heavy Brigade Combat Team Combined Arms Battalion*, is typical of the field manuals that cover battalion-level operations. It was published in March 2005. Appendix K covers the field processing of detainees. It defines a detainee as "any person captured or otherwise detained by an armed force."<sup>51</sup> The first page summarizes the Geneva Conventions as follows:

Detaining personnel carries with it the responsibility to guard, protect, and account for them. All persons captured, detained, or otherwise held in US Armed Forces custody must receive humane care and treatment. Further, to the extent permitted by the military situation, all detainees must be afforded protection from the effects of the conflict. US forces are obligated to protect detainees against all acts of violence, including murder, rape, forced prostitution, assault, theft, insults, public curiosity, photographing, filming/ videotaping for other than administrative purposes, bodily injury, or reprisals of any kind. The inhumane treatment of detainees is prohibited and is not justified by the stress of combat or by deep provocation.<sup>52</sup>

It also states that Soldiers are required to report any "act or allegation of inhumane treatment" to the chain of command.<sup>53</sup> These guidelines are drawn from Army Regulation 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*. Army regulations are more proscriptive than field manuals, they contain the rules that the Army operates by.

The appendix says that:

Processing begins when US forces take custody of an individual whose liberty has been deprived for any reason (capture, internment, temporary restriction). . . . [F]ield processing is accomplished at the point of capture and aids in security, control, initial information collection, and providing for the welfare of detainees.<sup>54</sup>

The method that the manual recommends using to field process detainees is called the five Ss and T. They stand for: search, silence, segregate, safeguard, speed (the detainee to a safe area), and tag.<sup>55</sup> Safeguard is further described, as follows:

Ensure detainees are provided adequate food, potable water, clothing, shelter, and medical attention. Ensure detainees are not exposed to unnecessary danger and are protected (afforded the same protective measures as the capturing force) while awaiting evacuation. Do not use coercion to obtain information from the captives. Provide medical care to wounded and/or sick detainees equal in quality to that provided to US forces. Report acts or allegations of abuse through command channels, to the supporting judge advocate, and the US Army Criminal Investigation Command.

Field Manual 2-22.3, *Human Intelligence Collector Operations*, was published on 6 September, 2006--eight months after "The Detainee Treatment Act of 2005" was enacted. Appendix A of the manual reprints the entirety of the *Geneva Conventions Relative to the Treatment of Prisoners of War* and the *Geneva Conventions Relative to the Protection of Civilian Persons in Time of War*. Its chapter 8 mentions the act and describes the only authorized interrogation techniques to be used by intelligence collectors. This activity is beyond the scope of the thesis; this research will instead focus on chapter 5 and Appendix D.

Chapter 5 deals with the generalities of HUMINT (human intelligence) collection. It states, in bold type, that:

All captured or detained personnel, regardless of status, shall be treated humanely, and in accordance with the Detainee Treatment Act of 2005 and DOD Directive 2310.1E, "Department of Defense Detainee Program," and no person in

the custody or under the control of DOD, regardless of nationality or physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with and as defined in US law.<sup>56</sup>

It establishes the definition of security internees, "detainees who are not combatants but who pose a security threat, may be under investigation, or who pose a threat to US forces if released."<sup>57</sup> It says that security internees have fewer protections than those guaranteed to those with EPW status--specifically citing the right to communicate with family members--and advises Soldiers to ask a military lawyer "for clarification of detainees' status and rights."<sup>58</sup>

This chapter of Field Manual 2-22.3 also establishes the parameters in which Military Policemen, and presumably other Soldiers, would assist HUMINT collectors in the performance of their duties. They may not

set conditions for interrogations (for example, "softening up" a detainee). For purposes of interrogation, military working dogs will not be used.<sup>59</sup>

After coordination, MPs may give incentives to detainees that were promised by interrogators (e.g., food or privileges beyond the baseline that do not violate security). However, giving and withdrawing incentives should not "affect the baseline standards of humane treatment."<sup>60</sup> The field manual's discussion of the incentive approach technique reiterates this by saying, "The HUMINT collector may not state or even imply that the basic human rights guaranteed by applicable national and international laws, regulations, and agreements will be contingent on a detained source's cooperation."<sup>61</sup>

Chapter 5 of FM-2-22.3 also establishes general parameters for interrogations without getting into the specifics of chapter 8. Although most of the language in this manual specifies collectors, this behavior is applicable to all Soldiers and can be considered to define cruel, inhuman, and degrading treatment. It cites "The Detainee

Treatment Act of 2005" definition using the fifth, eighth, and fourteenth amendments to the U.S. Constitution.<sup>62</sup> It states that applications not covered in DOD publications must be approved by higher headquarters before execution and that the following will not be approved under any circumstances: "forcing an individual to perform or simulate sexual acts or to pose in a sexual manner; exposing an individual to outrageously lewd and sexually provocative behavior; [or] intentionally damaging or destroying an individual's religious articles."<sup>63</sup> It specifies that:

If used in conjunction with intelligence interrogations, [the following] prohibited actions include, but are not limited to:

- Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner.
- Placing hoods or sacks over the head of a detainee; using duct tape over the eyes.
- Applying beatings, electric shock, burns, or other forms of physical pain.
- "Waterboarding"
- Using military working dogs.
- Inducing hypothermia or heat injury.
- Conducting mock executions.
- Depriving the detainee of necessary food, water, or medical care.<sup>64</sup>

Next, it cautions that "other forms of impermissible coercion may be more subtle, and may include threats to turn the individual over to others to be abused; subjecting the individual to impermissible humiliating or degrading treatment; [or] implying harm to the individual or his property."<sup>65</sup> Other prohibited approaches include, "threatening to separate parents from their children; or forcing a protected person [presumably an EPW, not a security detainee] to guide US forces in a dangerous area."<sup>66</sup>

Interestingly, the golden rule is also included. Field Manual 2-22.3 advises interrogators to:

Consider these two tests before submitting the [proposed interrogation] plan for approval: If the proposed approach technique were used by the enemy against one

of your fellow Soldiers, would you believe the Soldier had been abused? Could your conduct in carrying out the proposed technique violate a law or regulation? Keep in mind that even if you personally would not consider your actions to constitute abuse, the law may be more restrictive.<sup>67</sup>

This provision does not appear in any other directives, instructions, field manuals, or regulations.

Army Regulation 305-1, *Army Training and Leader Development*, "consolidates policy and guidance for Army training and leader development."<sup>68</sup> It "applies to the Active Army, the Army National Guard/Army National Guard of the United States, and the U.S. Army Reserve unless otherwise stated."<sup>69</sup> This regulation specifies the annual and pre deployment training that must be conducted by both individuals--during initial entry training and leadership schools--and by units. The unit training identified in the regulation is usually specified as either time based (monthly, annually, etc.) or event based (e.g., pre-deployment training). AR 350-1 meets the United States' obligation under Article 10 of the Convention Against Torture to

ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.<sup>70</sup>

It is also the "effective program to prevent violations" of the Law of War mandated in the *DoD Law of War Program*.<sup>71</sup>

The section of AR 350-1 that details the conduct of Law of War training is included in its entirety in Appendix B. Essentially, it consists of three levels of Law of War training--A through C-- which will be taught to Soldiers in individual and collective settings. Level A is taught at initial entry training to Soldiers and during the basic course for both warrant and commissioned officers. It consists of instruction on "The Soldier's

Rules," a clearly-worded set of basic guidelines which stress obeying the law of war.

They are:

- (1) Soldiers fight only enemy combatants.
- (2) Soldiers do not harm enemies who surrender. They disarm them and turn them over to their superior.
- (3) Soldiers do not kill or torture enemy prisoners of war.
- (4) Soldiers collect and care for the wounded, whether friend or foe.
- (5) Soldiers do not attack medical personnel, facilities, or equipment.
- (6) Soldiers destroy no more than the mission requires.
- (7) Soldiers treat civilians humanely.
- (8) Soldiers do not steal. Soldiers respect private property and possessions.
- (9) Soldiers should do their best to prevent violations of the law of war.
- (10) Soldiers report all violations of the law of war to their superior.

Level B training is conducted annually and before deployment in units organized under a Modified Table of Organization and Equipment (MTOE). The units not organized under an MTOE are generally non deployable or institutional units that would not be employed against an enemy. Level B training must be conducted both annually and before deployment.<sup>72</sup> There are some apparent contradictions in the type of training listed which will be discussed in chapters four and five. Level C training is conducted in Army schools which officers, warrant officer, and noncommissioned officers attend. It focuses on leader responsibilities during the planning and execution of operations in order to obey the law of war, as well as measures for reporting suspected war crimes.<sup>73</sup>

The next section of this chapter will analyze the organization and views of three human rights organizations on the subject of detainee handling.

### Amnesty International

Amnesty International is a member-run organization. Its International Council makes policy decisions for the organization. It is composed of delegates from national sections representing the countries home to members of the organization. Each national

section forwards initiatives presented by members at annual national and regional meetings. Amnesty International defines itself as a "worldwide movement of people who campaign for internationally recognized human rights."<sup>74</sup> AI has the following vision statement:

AI's vision is of a world in which every person enjoys all of the human rights enshrined in the *Universal Declaration of Human Rights* and other international human rights standards. In pursuit of this vision, AI's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.<sup>75</sup>

AI seeks to affect change through two methods. The first is an action, in which members are called on to write letters to human rights offenders. These letter writing campaigns have prevented the execution or disappearance of many prisoners of conscience. The second is the publication of research by experts in areas of interest to AI. The treatment of detainees in the war on terror is one part of AI's multiple campaigns. The majority of these actions either being pursued by AI or reported in its literature concern alleged abuses at Guantanamo, the legality of "The Military Commissions Act of 2006," or the issues surrounding those in long-term confinement in Iraq or Afghanistan. Those concerns are beyond the scope of this paper.

However, in their 13 July 2006 *United States of America Updated briefing to the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights* they raised the following concerns. In the section on "Continuing concerns about torture and other ill-treatment and the conditions of detention outside the USA," they report that "security internees" and "security detainees" are not only denied



access to communication with their families, but also with lawyers, courts, and the ICRC as well.<sup>76</sup>

The International Committee of the Red Cross (ICRC) does not have access to detainees for weeks after arrest, for example those in division or brigade holding facilities in Iraq or forward operating bases in Afghanistan. Nor is the ICRC's presence permanent in any one facility. Detainees are therefore completely cut off from the outside world for prolonged periods and at crucial stages, such as the initial stage of detention when torture or ill-treatment is most likely to occur.

The UN Commission on Human Rights has stated that "prolonged incommunicado detention may facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman or degrading treatment or even torture."<sup>77</sup>

This report goes on to report the results of military courts-martial which disciplined Soldiers for violations of orders. The illegal actions were use of stun guns and tasers on detainees, as well as kicking and punching detainees.<sup>78</sup> Finally it raises concerns about the following alleged abuses: exposure to cold as punishment (e.g. cold shower followed by exposure to an air conditioner), use of restraints as punishment, deprivation of food and water, sleep deprivation, confinement in small cells (.5m by 1.2m by 1.2m), and the use of stress positions.<sup>79</sup>

### Human Rights Watch

Human Rights Watch (HRW) differs from AI in that they have a much smaller membership. They describe themselves as having a higher ratio of experts to activists. Their strategy is to research and then expose human rights violations in local and international media to "shame offenders by generating press attention and to exert diplomatic and economic pressure on them by enlisting influential governments and institutions."<sup>80</sup> Their smaller membership also attempts to exert "diplomatic and

economic pressure" on offenders by "enlisting influential governments and institutions."<sup>81</sup> HRW has the following mission statement:

Human Rights Watch is dedicated to protecting the human rights of people around the world. We stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice. We investigate and expose human rights violations and hold abusers accountable. We challenge governments and those who hold power to end abusive practices and respect international human rights law. We enlist the public and the international community to support the cause of human rights for all.<sup>82</sup>

HRW uses international human rights law as the basis for its actions. Like Amnesty International, HRW shares a host of concerns about the prosecution of the war on terror that are beyond the scope of this paper.

The *By the Numbers* report of the Detainee Abuse Accountability Project listed the ongoing and complete investigations in April of 2006. In the 330 documented cases, the following included these alleged offenses: 220 assaults, 90 instances of physical or non-physical humiliation, 60 sexual assaults or abuses, and 40 uses of "stress" techniques.<sup>83</sup> At least 570 of the 600 defendants were U.S. Military, 410 of the defendants were investigated, resulting in 79 courts-martial. Of those, 54 resulted in a conviction or guilty plea with an additional 57 receiving non-judicial punishment. This comes to a total of 111 out of 570 military personnel convicted of abuse. 95% of the total were enlisted, not officers.<sup>84</sup>

In "*No Blood, No Foul*": *Soldier's Accounts of Detainee Abuse in Iraq*, HRW describes the conduct of interrogation at various Camps and Forward Operating Bases in Iraq from 2003 to 2005. Many of the accounts are corroborated by more than one Soldier or officer, and most of the accounts are from noncommissioned officers. One account describes the routine use of sleep deprivation, restraints, withholding of food and water,

and exposure to extreme temperatures by Military Police before the questioning started. Interrogations included physical abuse and exposure to strobe lights and deafening music. Others describe confining detainees in lockers or sleeping bags, the use of stress positions, strobe lights, sleep deprivation, loud music, forced exercise, and intimidation using military working dogs.<sup>85</sup>

This report reiterates the international human rights laws that forbid torture and cruel, inhuman, and degrading treatment. Aside from the examples listed above, however, it does not delineate where cruel, inhuman, and degrading treatment starts. It does expose a common theme though. In two of the case studies, the noncommissioned officer that spoke with human rights watch indicated that they were aware of the Geneva Conventions, but were not confident enough in their knowledge of it to make an issue of what they (correctly) perceived to be violations of it. Both were intimidated by their superiors into dropping their concerns with arguments that the Geneva Conventions did not apply to security detainees or that this was how the Army conducted interrogations.<sup>86</sup>

#### International Committee for the Red Cross

The ICRC was one of the main international organizations responsible for causing governments to create and ratify the Geneva Conventions. Its founder, Henry Dunant, witnessed the suffering of over 40,000 dead and wounded French and Austrian Soldiers left on the field of battle at Solferino for want of medical care in 1859. He returned home to Switzerland and started the movement that became the Red Cross.<sup>87</sup>

The ICRC's mission is to protect and assist the civilian and military victims of armed conflicts and internal disturbances on a strictly neutral and impartial basis. Its tasks include:

- visits to prisoners of war and civilian detainees;. . .
- spreading knowledge of humanitarian law;

- monitoring compliance with that law;
- drawing attention to violations, and contributing to the development of humanitarian law.

[The ICRC's] guiding principle is that even in war there are limits: limits on how warfare is conducted and limits on how combatants behave. The set of rules that were established with this in mind and endorsed by nearly every nation in the world is known as international humanitarian law, of which the Geneva Conventions are the bedrock.

It insists at all times on its independence. For, only if it is free to act independently. . . can the ICRC serve the true interests of the victims of conflict, which lie at the heart of its humanitarian mission

The ICRC is recognized in the Geneva Conventions as the independent body authorized to send "delegates to visit prisoners of war and civilian internees."<sup>88</sup> Common Article 3 authorizes the ICRC to offer to visit detainees in non-international conflicts. It can also provide medical assistance or material to detainees. Inspection methods include private interviews with detainees. In addition to the interviews and the inspection of conditions, ICRC delegates will assemble a list of persons detained at the facility to restore contact between detainees and family members.<sup>89</sup>

The ICRC makes the results of its inspections available to authorities confidentially, so there is little literature available from this organization specifying the treatment of detainees in the war on terror. The 2005 ICRC Annual Report does not address operations from initial point of capture to the first detainment facility. It noted that, "Long-term detention/internment in the absence of a clear legal process, mainly at Guantanamo Bay and in Afghanistan, remained of considerable concern."<sup>90</sup> It makes no mention of problems with detainee handling in the 38 facilities controlled by the Americans, Iraqis, and Kurds in 2005.<sup>91</sup> However, in a December 2006 press conference, they noted that, "The ICRC's lack of public comment on the conditions of detention and

the treatment of detainees in the nearly 80 countries where it visits places of detention must therefore not be interpreted to mean that it has no concerns.”<sup>92</sup> They feel that the confidentiality is essential to maintaining their access to facilities required for the accomplishment of their mission.

### DoD Directives and Instructions Limiting Soldier’s Rights of Speech, Press, and Assembly

There are Directives and Instructions which limit Soldier speech beyond what is allowed in the First Amendment to the Constitution. This section is included for two reasons. First, if one were to teach another soldier any material that was not produced or endorsed by the Department of Defense, the following two regulations could apply. Second, the topic of detainee handling is politically charged, and it is possible for Soldiers and leaders to blur the distinction between education and activism.

DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, dated 2 August 2004, prohibits Soldiers from "engaging in certain political activities."<sup>93</sup> A Soldier on active duty may “express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces.”<sup>94</sup> Also, a Soldier on active duty will not "participate in partisan political management, campaigns, or conventions."<sup>95</sup> Soldiers may not “allow or cause to be published partisan political articles signed or written by the member that solicits votes for or against a partisan political party, candidate, or cause”<sup>96</sup> but may express his opinion in a letter to the editor of a newspaper “if such action is not part of an organized letter-writing campaign or a solicitation of votes for or against a political party or partisan political cause or candidate.”<sup>97</sup>

The differentiation of partisan vs. nonpartisan political activity is key to this section, so the definition in DoDD 1344.10 will be used. Partisan political activity is "Activity supporting or relating to candidates representing, or issues specifically identified with, national or State political parties and associated or ancillary organizations."<sup>98</sup> Nonpartisan political activity is:

Activity supporting or relating to candidates not representing, or issues not specifically identified with, national or State political parties and associated or ancillary organizations. Issues relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character are not considered under this Directive as specifically being identified with national or State political parties.<sup>99</sup>

When participating in a nonpartisan political activity, a soldier shall not "engage in conduct that in any way may imply that the Department concerned or any component of such Department has taken an official position on, or is otherwise involved in, the local political campaign or issue."<sup>100</sup>

Department of Defense Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, was published on 1 October 1996 and certified current as of 1 December 2003. It deals primarily with the nuances of Soldiers participating in political assembly, but also includes a section dealing the distribution of literature. If Soldiers were to give other Soldiers material from human rights organizations that advocated a position on detainee handling different from that of the Department of Defense, this section might apply to them.

In the case of distribution of publications through other than official outlets, commanders may require that prior approval be obtained for any distribution on a military installation to determine whether there is a clear danger to the loyalty, discipline, or morale of military personnel, or if the distribution of the publication would materially interfere with the accomplishment of a military mission.<sup>101</sup>

The official outlet referred to in this section is the United States Postal Service. The Directive specifies that, "The fact that a publication is critical of government policies or officials is not, in itself, a ground on which distribution may be prohibited."<sup>102</sup>

### Summary and Conclusion

The DoD, AI, HRW, and the ICRC all have the Geneva Conventions and the international law included in this chapter as the basis of their position on the treatment of detainees.

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<sup>1</sup>*Second Peace Conference at The Hague*, 1899, I.I.1 [document on-line]; available from <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm#art1>; Internet; accessed 15 April 2007.

<sup>2</sup>*Ibid.*, I.II.7.

<sup>3</sup>United Nations, Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, *Geneva Convention relative to the Treatment of Prisoners of War*, 1949 [document on-line]; available from <http://www.ohchr.org/english/law/prisonerwar.htm>; Internet; accessed 15 April 2007.

<sup>4</sup>R. R. Baxter, "The Geneva Conventions of 1949 Before the United States Senate," *The American Journal of International Law* 49, no. 4 (October): 551.

<sup>5</sup>LTC Dana Stowell, "Treaties Covering EPW and POWs," *Detainee Operations in Iraq Elective Held 1 November 2006 - 8 December 2006*, 2.

<sup>6</sup>United Nations, Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, *Geneva Convention Relative to the Treatment of Prisoners of War*, 1949, I.4 [document on-line]; available from <http://www.ohchr.org/english/law/prisonerwar.htm>; Internet; accessed 15 April 2007.

<sup>7</sup>*Ibid.*

<sup>8</sup>*Ibid.*, I.3.

<sup>9</sup>*Ibid.*, III.17.

<sup>10</sup>U.S. Department of State, *The United States and the Founding of the United Nations, August 1941 - October 1945* (Washington, D.C., 2005) [document on-line];

available from <http://www.state.gov/r/pa/ho/pubs/fs/55407.htm>; Internet; accessed 2 December 2006

<sup>11</sup>United Nations, United Nations Conference on International Organization, *Charter of the United Nations*, 1945, IX.55 [document on-line]; available from <http://www.un.org/aboutun/charter/>; Internet; accessed 15 April 2007.

<sup>12</sup>League of Women Voters of the District of Columbia, *The Universal Declaration of Human Rights: Fifty Years Young* [document on-line]; available from <http://www.dcwatch.com/lwvdc/lwv9811b.htm>; Internet; accessed 2 December 2006.

<sup>13</sup>United Nations General Assembly, *The Universal Declaration of Human Rights*, 1948, 5 [document on-line]; available from <http://www.un.org/Overview/rights.html>; Internet; accessed 15 April 2007.

<sup>14</sup>United Nations General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1975 [document on-line]; available from <http://www.ohchr.org/english/law/declarationcat.htm>; Internet; accessed 15 April 2007.

<sup>15</sup>*Ibid.*, 1.

<sup>16</sup>*Ibid.*, 3.

<sup>17</sup>*Ibid.*, 5.

<sup>18</sup>United Nations, Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations: International Covenant on Civil and Political Rights New York, 16 December 1966* [document on-line]; available from <http://www.ohchr.org/english/countries/ratification/4.htm>; Internet; accessed 15 April 2007.

<sup>19</sup>United Nations General Assembly, *International Covenant on Civil and Political Rights*, 1966, III.7 [document on-line] available from <http://www.ohchr.org/english/law/ccpr.htm>; Internet; accessed 3 December 2006.

<sup>20</sup>United Nations, Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984* [document on-line]; available from <http://www.ohchr.org/english/countries/ratification/9.htm>; Internet; accessed 15 April 2007.

<sup>21</sup>*Ibid.*

<sup>22</sup>*Ibid.*

<sup>23</sup>United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, I.3 [document on-line];



available from <http://www.ohchr.org/english/law/cat.htm>; Internet; accessed 15 April 2007.

<sup>24</sup>*Ibid.*, I.10.

<sup>25</sup>*Ibid.*, I.11-13.

<sup>26</sup>*Ibid.*, I.10-14.

<sup>27</sup>United Nations, Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations 9.b. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment New York, 18 December 2002* [document on-line]; available from [http://www.ohchr.org/english/countries/ratification/9\\_b.htm](http://www.ohchr.org/english/countries/ratification/9_b.htm); Internet; accessed 15 April 2007.

<sup>28</sup>United Nations General Assembly, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 2002, I.1 [document on-line] available from <http://www.ohchr.org/english/law/cat-one.htm>; Internet; accessed 2 December 2006.

<sup>29</sup>United Nations, Office of the United Nations High Commissioner for Human Rights, *Ratifications and Reservations 9.b. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment New York, 18 December 2002* [document on-line]; available from [http://www.ohchr.org/english/countries/ratification/9\\_b.htm](http://www.ohchr.org/english/countries/ratification/9_b.htm); Internet; accessed 15 April 2007.

<sup>30</sup>"The Detainee Treatment Act of 2005," *U.S. Code*, vol. 42, sec. 2000dd (2005) [document on-line] available at <http://www.dod.mil/dodgc/olc/docs/PL109-163.pdf>; Internet; accessed 9 December 2006.

<sup>31</sup>*Ibid.*

<sup>32</sup>*Ibid.*

<sup>33</sup>U.S. Constitution, amend. 5-14.

<sup>34</sup>"The Detainee Treatment Act of 2005." *U.S. Code*, vol. 42, sec. 2000dd (2005) [document on-line] available at <http://www.dod.mil/dodgc/olc/docs/PL109-163.pdf>; Internet; accessed 9 December 2006.

<sup>35</sup>"The Military Commissions Act of 2006," *U.S. Code*, vol. 10, sec. 948b. (2006).

<sup>36</sup>U.S. Department of Defense, *Department of Defense Directive 2311.01E: DoD Law of War Program*, by Gordon England. (Washington, D.C., 2006), 2 [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf>; Internet; accessed 15 April 2007.

<sup>37</sup>Ibid., 2.

<sup>38</sup>Ibid.

<sup>39</sup>Ibid., 4.

<sup>40</sup>U.S. Department of Defense, *Department of Defense Directive 2310.01E: DoD Detainee Program*, by Gordon England (Washington, D.C., 2006), 2 [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>; Internet; accessed 15 April 2007.

<sup>41</sup>Ibid., 9.

<sup>42</sup>Ibid., 9.

<sup>43</sup>Ibid., 2.

<sup>44</sup>Ibid., 11.

<sup>45</sup>Ibid., 3.

<sup>46</sup>Ibid., 6.

<sup>47</sup>U.S. Department of Defense, *Department of Defense Directive 3115.09: DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, by Gordon England. (Washington, D.C., 2005), 2 [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf>; Internet; accessed 15 April 2007.

<sup>48</sup>Ibid.

<sup>49</sup>Ibid., 4.

<sup>50</sup>Ibid.

<sup>51</sup>Department of Defense, Department of the Army, FMI 3-90.5, *The Heavy Brigade Combat Team Combined Arms Battalion* (Washington, D.C., 2005), K-1.

<sup>52</sup>Ibid.

<sup>53</sup>Ibid.

<sup>54</sup>Ibid., K-2.

<sup>55</sup>Ibid., K-3.

<sup>56</sup>Department of Defense, Department of the Army, FM 2-22.3 Human, *Intelligence Collector Operations*. (Washington, D.C., 2006), 5-20.

<sup>57</sup>Ibid., 5-22.

<sup>58</sup>Ibid.

<sup>59</sup>Ibid., 5-16.

<sup>60</sup>Ibid.

<sup>61</sup>Ibid., 8-8.

<sup>62</sup>Ibid., 5-21.

<sup>63</sup>Ibid.

<sup>64</sup>Ibid.

<sup>65</sup>Ibid., 5-22.

<sup>66</sup>Ibid.

<sup>67</sup>Ibid.

<sup>68</sup>Department of Defense, Department of the Army, *Army Regulation 350-1, Army Training and Leader Development* (Washington, D.C. 2006), i.

<sup>69</sup>Ibid.

<sup>70</sup>United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984 [document on-line]; available from <http://www.ohchr.org/english/law/cat.htm#art10>; Internet; accessed 15 April 2007.

<sup>71</sup>U.S. Department of Defense, *Department of Defense Directive 2311.01E: DoD Law of War Program*, by Gordon England. (Washington, D.C., 2006), 2 [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf>; Internet; accessed 15 April 2007.

<sup>72</sup>Department of Defense, Department of the Army, *Army Regulation 350-1, Army Training and Leader Development* (Washington, D.C., 2006), 81.

<sup>73</sup>Ibid.

<sup>74</sup>Amnesty International, *About Amnesty International* [Document on-line]; available from <http://web.amnesty.org/pages/aboutai-index-eng>; Internet; accessed 3 February 2007.

<sup>75</sup>Ibid.

<sup>76</sup>Amnesty International, Human Rights Committee, *Updated briefing to the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights*, 13 July 2006. 6.1.b [Document on-line]; available from <http://web.amnesty.org/library/index/engamr511112006>; Internet; accessed 15 April 2007.

<sup>77</sup>Ibid.

<sup>78</sup>Ibid.

<sup>79</sup>Ibid.

<sup>80</sup>Human Rights Watch, *Some Frequently Asked Questions About Human Rights Watch* [Document on-line]; available from <http://www.hrw.org/about/faq/#3>; Internet; accessed 3 Feb 2007.

<sup>81</sup>Ibid.

<sup>82</sup>Human Rights Watch, *About HRW* [Document on-line]; available from <http://www.humanrightswatch.org/about/>; Internet; accessed 3 Feb 2007.

<sup>83</sup>Human Rights Watch, *By the Numbers*. [Document on-line]; available from <http://hrw.org/reports/2006/ct0406/2.htm>; Internet; accessed 2 March 2007.

<sup>84</sup>Ibid.

<sup>85</sup>Human Rights Watch, *"No Blood No Foul" Soldiers' Accounts of Detainee Abuse in Iraq* [Document on-line]; available from <http://www.hrw.org/reports/2006/us0706/>; Internet; accessed 2 March 2007.

<sup>86</sup>Ibid.

<sup>87</sup>The International Committee of the Red Cross, Production Sector, *Discover the ICRC* (Geneva, Switzerland: 2005), 6 [Document on-line]; available from [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0790/\\$File/ICRC\\_002\\_0790.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0790/$File/ICRC_002_0790.PDF!Open); Internet; accessed 2 March 2007.

<sup>88</sup>Ibid., 26.

<sup>89</sup>Ibid., 82.

<sup>90</sup>The International Committee of the Red Cross, External Resources Division, *Annual Report 2005* (Geneva, Switzerland: 2005), 287 [Document on-line]; available from [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section\\_annual\\_report\\_2005](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_annual_report_2005); Internet; accessed 2 March 2007.

<sup>91</sup>Ibid., 308.

<sup>92</sup>The International Committee of the Red Cross, *US Detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC*. 12 December 2006 [Document on-line]; available from <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/usa-detention-update-121205?opendocument>; Internet; accessed 3 February 2007.

<sup>93</sup>U.S. Department of Defense, *Department of Defense Directive 1344.10: Political Activities by Members of the Armed Forces on Active Duty*, by Paul Wolfowitz. (Washington, D.C., 2004), 2 [Document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/134410p.pdf>; Internet; accessed 15 April 2007.

<sup>94</sup>Ibid.

<sup>95</sup>Ibid.

<sup>96</sup>Ibid., 11.

<sup>97</sup>Ibid., 10.

<sup>98</sup>Ibid., 9.

<sup>99</sup>Ibid.

<sup>100</sup>Ibid., 13.

<sup>101</sup>U.S. Department of Defense, *Department of Defense Directive 1325.6: Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, by John P. White (Washington, D.C., 2003), 2 [Document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf>; Internet; accessed 15 April 2007.

<sup>102</sup>Ibid.

## CHAPTER 3

### RESEARCH DESIGN

The purpose of this study is to determine whether the Department of the Army law of war training for detainee handling and interrogation is sufficient to prepare Soldiers for contemporary operations. Chapter two reviewed the body of international law that applies to detainee treatment. It then explored the manuals from which Army training in this area is derived, and reviewed the published materials by three human rights organizations regarding the law of war as it applies to detainee handling and interrogation. Finally, it discussed the constraints on free speech and assembly by Soldiers and addressed specifically how Soldiers could present material not produced and approved by the DoD.

This paper will compare the positions of the Army, AI, HRW, and the ICRC to identify the areas in which they differ and determine if the training that Soldiers receive for detainee handling is sufficient. It will then explore the restrictions on Soldiers, in official or unofficial capacities, engaging in instruction or activism in law of war or detainee handling issues. Finally, it will answer the question of whether the current Army training on law of war and detainee handling is sufficient to prepare Soldiers for operations in the contemporary environment.

## CHAPTER 4

### ANALYSIS

#### Introduction

The purpose of this thesis is to determine if the Army's law of war and detainee operations training is sufficient to prepare Soldiers for contemporary operations and make recommendations for improvement if it is not. This chapter will analyze the materials covered in the literature review in Chapter 2 in order to answer the primary and secondary research questions. The secondary research questions that arise are as follows: (1) Should other interpretations be presented? (2) Are there significant differences between the interpretations of the Department of the Army and Human Rights Organizations? (3) Could the interpretations of human rights organizations be presented by a soldier to other soldiers? (4) What is the current Army standard for training? and (5) What are the restrictions on this type of activity by soldiers?

#### Should Other Interpretations Be Presented?

Human Rights organization's interpretations of the law of war do not need to be presented to soldiers because the groups this study examined all agree with the Department of Defense. Specifically, in the handling of noncombatants from the point of capture to a Brigade holding area, all three Human Rights organizations seek the enforcement of the same conventions that the Department of Defense does. Currently, these consist of *The Second Geneva Convention Relative to the Treatment of Prisoners of War*, and *The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

These human rights organizations' primary concern is that Soldiers abide by the international law as it is written. Although this has not been the case since 11 September 2001, the Department of Defense publications released since "The Detainee Treatment Act of 2005" are generally more restrictive than the international law. When these publications do not exactly quote the language of the conventions they are generally more restrictive as they attempt to interpret some of the vague language in the conventions.

### Are There Significant Differences?

For a comparison of the restrictions on a Soldier when detaining another person, see Figure 1. The left column lists the prohibitions enumerated by the Department of Defense in its various publications relating to the handling of detainees. The superscript numbers show which document or documents contain the prohibition. The right column lists the actions prohibited by international law, with superscript referencing the relevant convention. The two rows delineate the protections guaranteed to all detained persons, until their status has been determined by a Combatant Status Review Board (on top) and the extra protections provided to detainees designated as having enemy prisoners of war status. The protections have been listed in the order that they appear in the *Second Geneva Convention*, since that is the source document for the protections afforded by the DoD. An examination of Figure 1 reveals that the regulations and directives that apply to U.S. Soldiers are more restrictive than the two conventions.



Table 1. Comparison of DoD Policy and International Law

Department of Defense	International Law
Actions Which Are Prohibited Against All Detained Persons Until Status is Determined (Including Unlawful Combatants)	
Violence to Life and Person <sup>2</sup> Murder <sup>1,2</sup> Mutilation <sup>1,2</sup> All Cruel and Degrading Treatment <sup>1,2,4,5</sup> Physical and Mental Torture or Coercion <sup>1,2,3,4</sup> Threats or acts of violence <sup>1,2</sup> Taking of Hostages <sup>1</sup> Humiliating and Degrading Treatment <sup>2,4</sup> Denial of Due Process <sup>2</sup> Denial of food, water, shelter, clothing, medical treatment <sup>1,2</sup> Denial of exercise of religion <sup>2</sup> Insults <sup>1</sup> Cruel, Inhuman, and Degrading Treatment <sup>1,2,3</sup> Corporal Punishment <sup>1</sup> Collective Punishment <sup>1</sup> Execution w/out Trial by Proper Authority <sup>1</sup> Rape <sup>1,2</sup> Forced Prostitution <sup>1,2</sup> Assault <sup>1,2</sup> Theft <sup>1,2</sup> Public Curiosity <sup>1,2</sup> Bodily Injury <sup>1,2</sup> Reprisals <sup>1,2</sup> Subjecting to medical or scientific experiments <sup>1,2</sup> Sensory Deprivation <sup>1,2</sup> Filming for other than internal admin use <sup>1</sup> Use military working dogs to facilitate interrogation <sup>3,4</sup> "Softening Up" detainees prior to interrogation <sup>4</sup> During interrogation: forced nudity, forced sexual acts or poses, hood over the head, duct tape over eyes, beating, shocking, burning, causing pain, water boarding, inducing hypothermia or hyperthermia, conducting mock executions <sup>4</sup> Forcing to guide through a dangerous area <sup>4</sup> Threatening harm to property <sup>4</sup> Separating children from parents <sup>4</sup> Actions which violate the golden rule <sup>4</sup> Cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States <sup>5</sup>	Violence to Life and Person <sup>7</sup> Murder <sup>7</sup> Mutilation <sup>7</sup> Cruel Treatment <sup>7,8</sup> Torture <sup>7,8</sup> Mental Torture <sup>8</sup> Taking of Hostages <sup>7</sup> Humiliating and Degrading Treatment <sup>7,8</sup> Denial of Due Process <sup>7</sup> Denial of Medical Care <sup>7</sup>
Actions Prohibited Against Detainees with Prisoners of War Status	
Acts of Violence or Intimidation <sup>4</sup> Internment in Penitentiaries <sup>4</sup> Collective discipline involving food <sup>4</sup> Imprisonment without daylight <sup>4</sup> Forced removal of mines <sup>4</sup>	Seriously Endangering the Health of a Prisoner <sup>7</sup> Subjecting to medical or scientific experiments <sup>7</sup> Acts of Violence or Intimidation <sup>7</sup> Insults <sup>7</sup> Public Curiosity <sup>7</sup> Reprisals <sup>7</sup> Physical or Mental Torture <sup>7</sup> Threats <sup>7</sup> Denial of food, water, shelter, clothing, exercise of religion <sup>7</sup> Internment in Penitentiaries <sup>7</sup> Collective discipline involving food <sup>7</sup> Corporal Punishment <sup>7</sup> Imprisonment without daylight <sup>7</sup> Forced removal of mines <sup>7</sup>
References:	
<sup>1</sup> AR 190-8, 1 Oct 1997 <sup>2</sup> DoD Detainee Program (DoDD 2310.01E) <sup>3</sup> DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning (DoDD 3115.09) <sup>4</sup> FM 2-22.3 HUMINT Collector Operations <sup>5</sup> Detainee Treatment Act	
<sup>7</sup> Second Geneva Convention <sup>8</sup> Convention Against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment	

However, this was not the case prior to changes made in the wake of "The Detainee Treatment Act of 2005." Soldier's attitudes about the abuse of prisoners was not uniformly changed by the DoD Directives, DoD Instructions, Army Regulations, and Field Manuals already in place.<sup>1</sup> The reasons for this will be examined in chapter 5. Before proceeding to the next research question though, two additional sources of ambiguity will be examined: the definition of cruel, inhuman, and degrading treatment (CID); and the ramifications of "The Military Commissions Act of 2006" on detainee handling. These issues are germane to the research because they constitute two areas in which differences between the DoD and human rights organizations could exist in the future.

The Department of Defense and human rights organizations agree on the definition of torture established in the *Convention Against Torture, and other Cruel, Inhuman, or Degrading Treatment or Punishment*.

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.<sup>2</sup>

However, there is not a definition of CID in the convention or in any other piece of International Law with the same level of specificity. Article One of the convention merely states, "Torture constitutes an aggravated and deliberate form of cruel, inhuman, or degrading treatment or punishment."<sup>3</sup> It could then be proposed that cruel, inhuman, or degrading treatment would have the following definition: any act by which less than

severe pain or suffering, whether physical or mental, is intentionally or accidentally inflicted upon a person.

This proposed definition, derived by the author from the *Convention Against Torture*, is problematic because it is too broad. Many acts on either side of the line between what is and what is not cruel, inhuman, and degrading treatment are open to interpretation based on cultural norms, environmental acclimation, and so on. Department of Defense materials attempt to provide examples of CID that are more specific--and prohibit them. See Figure 1. For example, the Second Geneva Convention prohibits degrading treatment, while the DoD specifically forbids the following: rape, forced prostitution, assault, bodily injury, forced nudity, and forced sexual acts or poses.

"The Military Commissions Act of 2006" is a point of disagreement between human rights organizations and the DoD. It states: "No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."<sup>4</sup> Anthony D. Romero, Executive Director of the American Civil Liberties Union, sums up his organization's concerns in this 17 October 2006 press release:

The president can now, with the approval of Congress, indefinitely hold people without charge, take away protections against horrific abuse, put people on trial based on hearsay evidence, authorize trials that can sentence people to death based on testimony literally beaten out of witnesses, and slam shut the courthouse door for *habeas* petitions.<sup>5</sup>

All but one of these concerns are beyond the scope of this paper. The "horrific abuse" (i.e. torture of detainees) Mr. Romero mentions is prohibited by the DoD publications examined previously. These include the *DoD Law of War Program*;<sup>6</sup> the *DoD Detainee Program*;<sup>7</sup> *DoD Intelligence Interrogations, Detainee Debriefings, and Tactical*

*Questioning*;<sup>8</sup> *Field Manual 2-22.3 Human Intelligence Collector Operations*;<sup>9</sup> *Army Regulation 190-8 Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*;<sup>10</sup> and *Army Regulation 350-1 Army Training and Leader Development*.<sup>11</sup> Since combatant status review boards are not held below brigade level, at no time should a Soldier use anything other than the documents listed above to guide their actions.

#### Could Soldiers Teach a Non-DoD Interpretation to Other Soldiers?

The other secondary research question is if Soldiers could present non-DoD materials to other soldiers in a Law of War class. This research established that the DoD and the human rights organizations start from the same position. However, an instructor could not teach the position of a human rights organization (the text of the conventions) because that would be more permissive than the DoD's interpretation. If the current position of any of these organizations changes in the future, a Soldier could present that material with the following restrictions.

*Political Activities by Members of the Armed Forces on Active Duty* does not prohibit non-partisan political activity. All three of the human rights organizations examined in this research are non-partisan. Amnesty International declares in its mission statement that it "is independent of any government, political ideology, economic interest or religion" and "does not support or oppose any government or political system."<sup>12</sup> Human Rights Watch labels itself an "independent, nongovernmental organization," and although it does not use the term non-partisan to describe itself this research was unable to find any endorsements of political candidates or parties in its literature.<sup>13</sup> One of the ICRC's seven fundamental principles is neutrality: "the Movement may not take sides in

hostilities or engage at any time in controversies of a political, racial, religious, or ideological nature."<sup>14</sup> *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces* makes it clear that "the fact that a publication is critical of government policies or officials is not, in itself, a ground on which distribution may be prohibited."<sup>15</sup>

#### What is the Current Army Standard for Training?

AR 350-1's guidance on Law of War training is reprinted in Appendix A. Paragraphs 4-18 c(1)-(2) describe the annual (Level B) training that Soldiers receive. The regulation requires that training be conducted by a Judge Advocate General (JAG) officer or a paralegal noncommissioned officer. It is not specifically stated in the regulation, but this training is usually presented in a classroom or auditorium setting. Paragraph 4-18c (3)-(4) requires that additional training be conducted in realistic conditions, incorporating military police (guards) and military intelligence (interrogators) whenever possible. Paragraph 4-18 c(5) states that "training on the law of war and detainee operations" will be integrated into collective training: field training exercises, external evaluations, and combat training center rotations (currently brigade-level, 20-day mission rehearsal exercises).

#### What are the Restrictions on This Type of Activity?

If a Soldier were to present alternate interpretations of the Law of War, it would have the following restrictions. First, it would not count as that unit's Level-B training. Second, the Soldier would have to ensure that the DoD position is presented in any lesson plan alongside the position of any other group.<sup>16</sup> Third, any materials would have to be

cleared by the chain of command before use. Although the required level of approval is not specified in either directive, presumably the first level with an assigned military lawyer (Brigade) would be appropriate. Lastly, the soldier would have to insure that any discussion remained non-partisan. Complete definitions and examples of partisan and non-partisan activities are in both directives.

### Primary Research Question

Answering the thesis question of whether Army training is sufficient to prepare soldiers for contemporary operations requires the examination of two components of training. These are the training's content and the way in which it is conducted. As DoD policy attempted to clarify the content of International Law it became generally more restrictive. In terms of content it is sufficient.

This flies in the face of the Army Chief of Staff's survey, where 36% of respondents "agree" or "strongly agree" that "torture should be allowed in order to gather important info about insurgents," and only 55% "would report a unit member for injuring or killing a noncombatant."<sup>17</sup> The explanation of this disparity must lie in the way in which the training was conducted. Improving this will be the focus of Chapter 5.

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<sup>1</sup>Kimberly Johnson and Kelly Kennedy, "Almost Half of Surveyed Troops Say Some Torture OK," *Army Times*, 14 May 2007, 28.

<sup>2</sup>United Nations, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, New York, 10 December 1984 [document on-line]; available from <http://www.ohchr.org/english/law/cat.htm#art10>; Internet; accessed 15 April 2007.

<sup>3</sup>Ibid.

<sup>4</sup>"The Military Commissions Act of 2006," *U.S. Code*, vol. 10, sec. 948b. (2006).

<sup>5</sup>American Civil Liberties Union, *President Bush Signs Un-American Military Commissions Act, ACLU Says New Law Undermines Due Process and the Rule of Law* [document on-line]; available from <http://www.aclu.org/safefree/detention/27091prs20061017.html>; Internet; accessed 5 May 2007.

<sup>6</sup>U.S. Department of Defense, *Department of Defense Directive 2311.01E: DoD Law of War Program*, by Gordon England (Washington, D.C., 2006) [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf>; Internet; accessed 15 April 2007.

<sup>7</sup>U.S. Department of Defense, *Department of Defense Directive 2310.01E: DoD Detainee Program*, by Gordon England (Washington, D.C., 2006) [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>; Internet; accessed 15 April 2007.

<sup>8</sup>U.S. Department of Defense, *Department of Defense Directive 3115.09: DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, by Gordon England (Washington, D.C., 2005) [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf>; Internet; accessed 15 April 2007.

<sup>9</sup>Department of Defense, Department of the Army, *FM 2-22.3 Human Intelligence Collector Operations* (Washington, D.C., 2006).

<sup>10</sup>Department of Defense, Department of the Army, *Army Regulation 190-8 Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (Washington, D.C. 1997).

<sup>11</sup>Department of Defense, Department of the Army, *Army Regulation 350-1 Army Training and Leader Development* (Washington, D.C. 2006).

<sup>12</sup>Amnesty International, *About Amnesty International* [Document on-line]; available from <http://web.amnesty.org/pages/aboutai-index-eng>; Internet; accessed 3 Feb 2007.

<sup>13</sup>Human Rights Watch, *About HRW* [Document on-line]; available from <http://www.humanrightswatch.org/about/>; Internet; accessed 3 Feb 2007.

<sup>14</sup>The International Committee of the Red Cross, Production Sector, *Discover the ICRC* (Geneva, Switzerland: 2005) [Document on-line]; available from [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0790/\\$File/ICRC\\_002\\_0790.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0790/$File/ICRC_002_0790.PDF!Open); Internet; accessed 2 March 2007.

<sup>15</sup>U.S. Department of Defense, *Department of Defense Directive 1325.6: Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, by John P. White (Washington, D.C., 2003), 2 [document on-line]; available

from <http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf>; Internet; accessed 15 April 2007.

<sup>16</sup>Judge Advocate General Corps lawyer MAJ Cynthia Olsen, interview by author, 26 October 2006, Leavenworth, KS.

<sup>17</sup>Kimberly Johnson and Kelly Kennedy, "Almost Half of Surveyed Troops Say Some Torture OK," *Army Times*, 14 May 2007, 28.



## CHAPTER 5

### SUMMARY AND CONCLUSIONS

Soldiers managing violence in this [urban] setting require the highest level of individual and organizational discipline and judgment. Soldiers will require the mental agility to separate their aggression toward threats from the noncombatant civilian population. The training, effort, and command emphasis in this area is as important as fully successful results. Such efforts strongly impact national and international perceptions of the operation.

FM 3-06, *Urban Operations*<sup>1</sup>

#### Introduction

The purpose of this thesis is to determine if the Army's law of war and detainee operations training is sufficient to prepare Soldiers for contemporary operations and make recommendations for improvement if it is not.

Chapter 4 ended with the analysis that the content of law of war and detainee operation training was sufficient. This chapter will present conclusions about the conduct of law of war and detainee handling training and makes recommendations for its improvement. Additionally, it will identify areas for further study not covered in this work.

This chapter is organized into four parts: introduction, conclusions and recommendations, recommendations for further study, and conclusion.

#### Conclusions and Recommendations

The Human Rights Watch article "'No Blood No Foul' Soldiers' Accounts of Detainee Abuse in Iraq" detailed three case studies of Soldiers and units violating DoD policy. A recurring theme was that they suspected that they were participating in illegal

activities but dropped their complaints after a supervisor told them they were not violating the law of war. These soldiers claimed they could not find a clear articulation of right and wrong to inform their disagreement with the chain of command. One Soldier complained to the commander at his detention facility, but was browbeaten into believing that the Geneva Conventions had been superseded by more recent regulations.<sup>2</sup>

Improving the ability of Soldiers to recognize and report violations of the law of war involves improving the conduct of the training they receive. This section will include two recommendations for improving the content of US and DoD policy and two more recommendations for improving the conduct.

The "Soldier's Rules" need to be updated to reflect current policy. Specifically, rule number 3 which states: "Soldiers do not kill or torture enemy prisoners of war."<sup>3</sup> It should be amended to: "Soldiers do not kill or torture anyone in their custody." *The DoD Detainee Program* states that "all detainees [defined as both lawful and unlawful enemy combatants] shall be treated humanely and in accordance with U.S. law, the law of war, and applicable U.S. policy."<sup>4</sup> These protections should not be limited to only those who meet the Geneva Convention definition of prisoners of war.

The Department of Defense should refine a definition of Cruel, Inhuman, and Degrading Treatment. Currently "The Detainee Treatment Act of 2005" defines CID as any treatment or punishment prohibited by the fifth, eighth, and fourteenth amendment. However, this body of law is so large that it defies summarization. FM 2-22.3 contains a list which is also a good start and includes: nudity, the performance of sexual acts, hoods or sacks over the eyes, beatings, electric shock, burns, waterboarding, using dogs,

inducing hypothermia or heat injury, conduct mock executions, and depriving the detainee of food, water, or medical care.

"The Military Commissions Act of 2006" should be amended to specify which rights will be denied to unlawful enemy combatants. The part of this legislation in need of revision states "no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." The words "as a prisoner of war" should be added to the end of this sentence. The expanded protections afforded to a prisoner of war are listed in Figure 1, but the protections afforded to all detainees should not be suspended.

A more consolidated source of information than finding and reading the relevant portions of International Law, U.S. Law, DoD directives, DoD Instructions, DA Regulations, Field Manuals, or this thesis would be better. The ninth and tenth Soldier's Rules state that violations of the law of war should be prevented and reported, respectively. Therefore, Soldiers should have access to either a Training Circular or some similarly short and easy to read pamphlet that collects the information in the documents above and explains it in an easy to read fashion.

The best way to improve training is to improve the manner in which it is conducted. Simply meeting the requirements in AR 350-1 could be done in an auditorium over the course of an hour, but might not sufficiently prepare Soldiers for contemporary operations. Commanders should aggressively expanded training methodologies to include multiple styles that reach different kinds of learners. In addition to classroom instruction, include case studies from previous incidents for smaller group meeting and discussion. Appendix B contains materials that would facilitate this kind of training. During

collective training, planners and observer/ controllers should incorporate tactical dilemmas that test law of war knowledge and detainee handling and address them during AARs.

### Recommendations for Further Study

This work did not include a history of the evolution of United States detainee policy from 11 September 2001 through the passage of "The Detainee Treatment Act of 2005." Several sources imply that this will be a fascinating historiography, but the primary sources required to complete the research will likely be classified for some time to come. See "The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted"<sup>5</sup> by Jane Mayer for an introduction to this topic.

One of the areas delimited by this thesis was the long-term detention facilities administered by Military Police forces. Some elements were included where there might be some overlap (e.g. tactical questioning), but a detailed comparison of the guidelines in AR 190-8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, with the checklists used by the ICRC was not conducted. Scholars interested in this level of detainee handling should start with those two documents.

### Conclusion

The actions of Soldiers and units at the tactical level are having greater strategic effects than they did in previous conflicts. The adaptive enemy that the United States faces in Iraq and Afghanistan has increasingly turned to more sophisticated methods of creating and exploiting propaganda to achieve victory. Although enemy propaganda is unavoidable, Soldiers should make every effort to not contribute to this enemy effort

through violations of the law of war. Leaders should insure that their subordinates are adequately trained before deployment to insure that the Army retains the moral high ground and is able to use that key terrain to defeat its enemies.

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<sup>1</sup>Department of Defense, Department of the Army, Field Manual 3-06, *Urban Operations* (Washington, D.C. 2006), 6-13.

<sup>2</sup> Human Rights Watch, *"No Blood No Foul" Soldiers' Accounts of Detainee Abuse in Iraq*, 14 [document on-line]; available from <http://www.hrw.org/reports/2006/us0706/>; Internet; accessed 2 March 2007.

<sup>3</sup> Department of Defense, Department of the Army, Army Regulation 350-1, *Army Training and Leader Development* (Washington, D.C. 2006), 82.

<sup>4</sup> U.S. Department of Defense, Department of Defense Directive 2310.01E, *DoD Detainee Program*, by Gordon England. (Washington, D.C., 2006), 2. [document on-line]; available from <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>; Internet; accessed 15 April 2007.

<sup>5</sup> Mayer, Jane. "The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted," *The New Yorker*, [document on-line]; available from [http://www.newyorker.com/printables/fact/060227fa\\_fact](http://www.newyorker.com/printables/fact/060227fa_fact); Internet; accessed 23 September 2006.

## GLOSSARY

**Atrocity.** As defined by the American Heritage Dictionary: An appalling or atrocious act, situation, or object, especially an act of unusual or illegal cruelty inflicted by an armed force on civilians or prisoners. The United Nations does not provide a more exact definition. Instead the terms War Crime and Crime Against Humanity are used.

**Crime Against Humanity** The Rome Statute of the International Criminal Court defines a crime against humanity in Article 7 as any "widespread or systematic attack against any civilian population," including murder; extermination; enslavement or forcible population transfer; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence; enforced disappearance of persons; apartheid; and "other inhumane acts of a similar character intentionally causing great suffering."

**Cruel, Inhuman, or Degrading Treatment.** "The Detainee Treatment Act of 2005" defines this as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth [grand jury indictment to hold, double-jeopardy, self-incrimination, and due-process], Eighth [cruel and unusual punishment], and Fourteenth Amendments [equal protection] to the Constitution" of the United States.

**War Crime.** The Rome Statute of the International Criminal Court defines a crime against humanity in Article 8 as "Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention." The enumerated list of war crimes is too extensive to include here. Selected portions are elaborated on in the body of this paper.

## APPENDIX A

AR 350-1, *Army Training and Leader Development*, pp. 80-81

### **4–18. Law of war training**

*a.* Soldiers and leaders require law of war training throughout their military careers commensurate with their duties and responsibilities. Requirements for training at the following levels are specified in paragraphs 4–18*b–d* of this regulation.

(1) Level A training is conducted during IET [Initial Entry Training] for all enlisted personnel and during basic courses of instruction for all WOs [Warrant Officers] and officers.

(2) Level B training is conducted in MTOE [Modified Table of Organization and Equipment--typically deployable] units.

(3) Level C training is conducted in TASS [The Army Schools System].

*b.* Level A training provides the minimum knowledge required for all members of the Army. The following basic law of war rules (referred to as “The Soldier’s Rules,” which stresses the importance of compliance with the law of war) will be taught during level A training:

(1) Soldiers fight only enemy combatants.

(2) Soldiers do not harm enemies who surrender. They disarm them and turn them over to their superior.

(3) Soldiers do not kill or torture enemy prisoners of war.

(4) Soldiers collect and care for the wounded, whether friend or foe.

(5) Soldiers do not attack medical personnel, facilities, or equipment.

(6) Soldiers destroy no more than the mission requires.

(7) Soldiers treat civilians humanely.

(8) Soldiers do not steal. Soldiers respect private property and possessions.

(9) Soldiers should do their best to prevent violations of the law of war.

(10) Soldiers report all violations of the law of war to their superior.

*c.* Level B training is conducted in MTOE units for all unit personnel as follows:

(1) Training is conducted annually and conducted again prior to deployment when directed by a deployment order or appropriate authority.

(2) Commanders will establish specific training objectives; a qualified instructor will conduct training in a structured manner, and evaluate performance using established training conditions and performance standards. For the purposes of this training, a qualified trainer is defined as a JAGC [Judge Advocate General Corps] officer or a paralegal noncommissioned officer certified to conduct such training by a JAGC’s officer.

(3) Training will reinforce the principles set forth in The Soldier’s Rules. Additionally, training will emphasize the proper treatment of detainees, to include the 5 Ss and T (search, segregate, silence, speed to a safe area, safeguard, and tag). Soldiers will be required to perform tasks to standard under realistic conditions. Training for all unit leaders will stress their responsibility to establish adequate supervision and control processes to ensure proper treatment and prevent abuse of detainees.

(4) Training will be designed around current missions and contingency plans (including anticipated geographical areas of deployment or rules of engagement). Detainee operations training will integrate Military Police and Military Intelligence personnel where doctrinally appropriate.

(5) In addition to the training described in paragraphs 4–18 c(1)–(4) above, training on the law of war and detainee operations will be integrated into other appropriate unit training activities, FTXs [Field Training Exercises] and unit EXEVALs [External Evaluations] at home station, CTCs [Combat Training Centers] and mobilization sites. Maximum combat realism will be applied to tactical exercises consistent with good safety practices.

*d.* Army schools will tailor law of war training to the tasks taught in those schools. Level C training will emphasize officer, WO, and NCO [Non-Commissioned Officer] responsibilities for—

(1) Their performance of duties in accordance with the law of war obligations of the United States.

(2) Law of war issues in command planning and execution of combat operations.

(3) Measures for the reporting of suspected or alleged war crimes committed by or against U.S. or allied personnel.



## APPENDIX B

### SUGGESTED CONTEMPORARY MATERIAL FOR CASE STUDY TRAINING

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